No. 22,108

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMANUAL BLAZ MRKONJIC-RUZIC,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

An Indictment charging appellant with a violation of 18 USC §1001, false statement to an agency of the United States was returned on January 7, 1966, by the Grand Jury of the United States District Court for the Northern District of California, Northern Division, Sacramento. In substance, the Indictment charges defendant with knowingly giving false answers while under oath to questions asked of him in an Application to File Petition for Naturalization lodged by defendant at Sacramento on June 17, 1965.

Upon his plea of not guilty defendant was tried and convicted by a jury on March 15, 1967, before The Hon. Sherrill Halbert, United States District Judge.

On March 29, 1967, appellant was sentenced to the statutory maximum of 5 years imprisonment pursuant to 18 USC §4208 (c) and ordered sent for a 90 day study subject to modification in accordance with 18 USC §4208 (b).

Timely appeal was made.

APPLICABLE STATUTES

18 USC §6 Department and agency defined.

"As used in this title:

The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." June 25, 1948, c. 645, 62 Stat. 865.

18 USC §1001. Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious

or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 749.

5 USC §101. Executive departments

The Executive departments are:

The Department of State
The Department of the Treasury
The Department of Defense
The Department of Justice
The Post Office Department
The Department of the Interior
The Department of Agriculture
The Department of Commerce
The Department of Labor
The Department of Health, Education, and Welfare
The Department of Housing and Urban Development
The Department of Transportation

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378; Pub. L. 89-670, §10(b), Oct. 15, 1966, 80 Stat. 948.

18 USC §1015. Naturalization, citizenship or alien registry

(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or

Shall be fined not more than $5,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 752.

STATEMENT OF FACTS

Adversary counsel in effectuating their respective roles at times develop polarized views and opinions as to the most efficacious manner of trial fact presentation. This case bears witness to such polarization.

On the one hand, government counsel's position is simple. Defendant signed an application for naturalization under oath. One particular answer among others was untrue.

The question was

"Other names I have used are .....".

The directions supplied on the form of "Application to File Petition for Naturalization" were:

> "Print or type here any other name you have ever used, including maiden name".

The defendant typed in "None", crossed it out and typed in "Emmanuel Blaz Mrkonjic Ruzic". In answer to a previous question "My name is ....." the defendant had typed "Emmanuel Blaz Rusic".

Page 5 of the form of application then used contained the following admonition:

> "*Unless you answer* all *items in full,* it may be necessary to *return* the application to you". (Emphasis ours.)

The form now employed by the Immigration and Naturalization Service contains a warning:

> "Penalties: Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact."

At a hearing conducted under oath in Sacramento by Earl C. Bray, attorney for the Immigration and Naturalization Service, hereafter referred to as the Service, defendant denied the use of a name other than Emmanuel Blaz Mrkonjic Ruzic (RT 286, 291).

Ultimately defendant signed, under oath, a four page document in two parts, Form N-400 (Rev. 8-1-63) that is the basis of this Indictment.

Over a period of years, defendant in fact had used many names. Among them are Manuel Blaz Ruzic (RT 34) used in his so-called *Curriculum Vitae* for Stanford University where he was a graduate student. To an investigator for the Service in a so-called Private Bill Unit hearing, John Ruggiero of New York City, defendant, gave the name Manuel Blaz Ruzic (RT 65), the family name Bojanic (RT 105) and Emanuel Blaz Rusic (RT 105). With Father Thomas J. Malone of the Maryknoll Fathers, while defendant was a seminarian, he was known alternately as Bojanic and Ruzic (RT 206, 207). To Charles Bergerson of the Voice of America where the defendant worked intermittently he used both Bojanic and Ruzic (RT 234, 244 and 258).

When examined in Dallas, Texas, by Donald C. Mock of the Service's Travel Control, at a time when defendant was a student at Texas Christian University, he used Ruzic (RT 423) and Ignatius Bojanic (RT 431). The government file also revealed that when admitted into the country he affected Cherubim Ruzic, Dr. Emmanuel Mozart and L'Abbe Blaz Mrkonkic Ruzic (RT 434).

When defendant took the stand he admitted the use of Blaise C. Ruzic (RT 535), Ignatius Bojanic (RT 543), Professor and Reverend Emmanuel B. Ruzic (RT 597), E. B. Roseman (RT 612) and Reverend Blaz Mrkonjicruzic (RT 628). He also received mail from Yugoslavia under another name, Kraljich (RT 657).

The story of how defendant came to use these names is involved but interesting. Using defendant's recitation as the basis or frame, reference will also be made to the government's case where the same or similar material was presented.

Defendant was born in Yugoslavia, in the part known as Croatia in 1930 (RT 444). He, and his family moved to Zagreb and at age 19 he entered the theological seminary affiliated with the University of Zagreb (RT 446). As the result of local civil disorders, he and other seminarians were arrested and detained for a three month period in 1951 (RT 447). He fled Yugoslavia in 1952 (RT 449) passing through Italy (RT 449) en route to Paris, France.

While in Paris he was hospitalized for TB (RT 450) and was a student at several seminaries (RT 248, 249). Leaving France in 1953 (RT 249, 250), he went to Caracas, Venezuela (RT 451) and ultimately arrived in Canada (RT 248-250). As a student, he entered the USA in August, 1954 (RT 247) where he enrolled at Catholic University, Washington, D.C. (RT 459-460).

Periodically he would return to Canada and on one of his trips, and while a guest at a convent at Sher-

brook, he purloined the transcript of grades and studies, known in Yugoslavia as an Index, from a nun named Sister Ignatius or Matija Bojanic or Sister Ignacija (RT 460, 461, 139, 140). He denied stealing the Index, saying that the sister gave it to him to translate. He did not know what happened to the original (RT 620, 621). The Index was altered, translated into English and used by defendant as his own wherever he enrolled as a student in the USA whether it was Catholic University, Abiline Christian, Texas Christian, University of California or Stanford. From and through the use of the Index he arrogated to himself the names Ignatius and Bojanic.

Present at the private bill hearing in New York City conducted by Mr. John Ruggiero of the Service was a Maryknoll priest, a Father John McGovern, whose subsequent letter to Father Malone reviews defendant's life up to January, 1968 in a most derogatory fashion. Beginning at page 244 and continuing through page 255 of the transcript is the record of Ruzic's failures as a seminarian in Paris, Canada and the USA, his use of the forged Index, his religious vacillations between the Catholic and Lutheran faiths, his various jobs and his manipulation of others for his benefit.

After either being expelled from or voluntarily leaving the Maryknoll Fathers (RT 205) on January 16, 1958, he returned to Canada (RT 117) only to return to Abiline, Texas in March, 1958, to Dallas, Texas (RT 484).

Ruzic was deported, or in lieu left voluntarily, to go to Canada (Exhibit 15) via Buffalo, New York in

the latter part of 1958 (RT 485, 486). Upon being refused readmittance at Buffalo in January, 1959 (RT 486) he surreptitiously reentered through Hamilton, Ontario and Detroit and returned to Dallas (RT 486). Apart from a California sojourn at Sequoia National Park where he worked in the summer of 1959 (RT 487, 488) he remained in the Dallas area as a student at Texas Christian University (RT 489-493) receiving permanent resident status in May, 1960 (RT 493).

Ruzic ultimately came to San Francisco (RT 494), lived in Monterey during the summer of 1960 (RT 497), in the fall of 1960 at Palo Alto (RT 320, 498), enrolled and was a teaching assistant at the University of California during most of 1961 (RT 321, 499-501). After acceptance as a student at Stanford, defendant lived in Palo Alto from the spring of 1962 up to the spring of 1964 (RT 321, 502-509) ultimately receiving a Master's degree from Stanford.

From these peregrinations one may properly doubt if Ruzic ever was a seminarian in Yugoslavia. But in any event, building upon the use of a false name, Ignatious Bojanic, and a false set of student documents taken from a Croatian nun, defendant came a long way. To offset these undisputed and unsavory facts, defense counsel, William Lally, formerly Assistant United States Attorney, sought to establish through the enormity of the file in the Service's possession that no government official was in fact deceived, despite Ruzic's admittedly untrue answers at his Sacramento hearing and elsewhere.

Mr. Lally began to execute his plan immediately after the jury was selected, countering government counsel's opening statement with one of his own in which he accused the government of bad faith and trickery (RT 24). While the Court was critical of his conduct (RT 28) its remarks were restrained (RT 28-30).

Later defense counsel used the word "snatch" to characterize action by the United States attorney, which brought on a mildly critical exchange between the Court and counsel (RT 46).

Defense counsel sought to raise a *Miranda* type objection as to evidence of the New York City Private Bill investigation conducted by Mr. Ruggiero for the Service but did not get very far (RT 69).

A more vitriolic exchange occurred between the Court and counsel (RT 82), which can be denominated feisty on the part of defense counsel.

Later on that same trial day, another rather heated exchange between the Court and counsel occurred over counsel's request to see the Service's voluminous Ruzic file (RT 115-117).

Another exchange begins on page 234 where Mr. Lally snidely characterized as "kindly" the turning over to him of some lengthy documents regarding Mr. Ruzic's early American career. By this point of time the Court has a view of Mr. Ruzic and his activities that is at odds with defense counsel's attempts in his opening statement to make out his client as "lily white", RT 238, and the Court said so in a no uncertain but restrained fashion (RT 239-240).

Faced with the necessity of laying a foundation requisite to the admission of a document, government counsel inquired if the requisite foundation could be waived (RT 277). Defense counsel responded in querulous fashion that "Mr. Lally waives nothing". Aptly, the Court described this attitude as "unreasonable" as well it was.

At the conclusion of the testimony of the government witness, the Court ordered defense counsel to do all of his foundational cross-examination or be precluded from raising the issue (RT 279). Again the language of the Court was firm but temperate. It would brook no trifling.

Because government counsel kept repeatedly drawing forth documents from a file on his table and offering them in evidence, one at a time, defense counsel asked that the whole file be admitted and that he be permitted to examine it in detail (RT 362). The Court told him to stop—that he could put his own case in later—Lally persisted—again the Court stopped him (RT 363) but without acrimony, merely with asperity and shortness.

A witness from the California State Department of Education, a Mr. Price, brought to court an Application for Teaching Credentials and associated documents to the effect that as late as 1965, defendant continued to use the altered Index of Sister Ignacija Bojanic as his own (RT 363-384). After prolonged colloquy over admissibility and foundation, the Court strongly admonished defense counsel for constantly, through the office of cross-examination, trying his case before it was his turn (RT 373).

But if the Court leaned on defense counsel at every possible opportunity with varying weight, consider the holocaust unleased at Mr. Lally for 5 pages of transcript. (RT 435-440.) This outburst actually was begun when defense counsel objected to the prosecutor employing the phrase "sneaked back in" to characterize Ruzic's return to the USA through Detroit rather than through Buffalo, his exit port (RT 435). In the presence of the jury, the Court was bitingly critical of Mr. Lally, telling him that he was trying to testify himself (RT 436), telling the jury to pay no attention to the lawyers (RT 436) and then once the jury was excused really letting defense counsel have it right between the eyes. Lally was severally accused of baiting the Court (RT 437), trying his case by innuendo (RT 437), and because of his skill, intentionally doing things to disrupt the normal court procedure (RT 438). The Court criticized defense counsel for not standing while objecting and for making a speech (RT 439). This language would be enough to cow all but the toughest defense lawyer in criminal cases.

But its worst effect, was in telling the jury "not to pay attention to these lawyers" as if to say to the jury that defense counsel was caviling with them to hide from them the truth. Such a characterization could only have substantially injured whatever chances with the jury Ruzic might have had.

Ruzic's cross-examination was devastating. He admitted that he might have claimed falsely to have studied in Rome (RT 541), not telling about all the

places at which he had studied (RT 541, 570), exaggerating years, courses taken, and grades received at some places of study (RT 542, 543), using the purloined name of Bojanic (RT 546), using Sister Bojanic's Index as late as 1961 (RT 551), at the University of California as his own (RT 541, 570). Ruzic also admitted giving Sister Ignacija's records to Texas Christian as his own (RT 551), showing them to the Maryknoll Fathers (RT 551), showing giving them to Catholic University (RT 552), and claiming an academic degree never awarded to him (RT 554).

Ruzic was forced to admit that in every instance of entering a school or university using his false credentials, he was unable to perform, lacked the claimed background and failing in his studies (RT 558). He also admitted to giving false background information when seeking employment from the Voice of America (RT 579), falsely claiming to have studied at the Sorbonne in Paris (RT 582), and falsely claiming to have worked in Paris for UNESCO when applying for a teaching position at Great Falls College (RT 586, 587). The final clincher was having to admit that he had never presented himself in this country in a true, honest, and correct fashion. (RT 589.)

While cross-examination went on for 100 more pages, it was just more of the same false representations (RT 590 to 692), including grade tampering at TCU (RT 599), even to having to admit that what purported to be his own transcript, received from Yugoslavia was the same as Sister Bojanic's Index

(RT 623-624). To further accentuate the obvious, Ruzic was finally forced to admit that he was untruthful to the Service when he failed to inform the Service of his voluntary return to Canada to escape deportation (RT 627). So that anything done by way of rehabilitation on redirect examination was probably for naught. The jury had heard too much.

Obviously, as a matter of hindsight, this was no case to try before a jury. The Government, as usual, had too much evidence. But defense counsel was entitled to a break better than he got, as was Ruzic. Again, hindsight dictates a law attack and at best a court trial. But who knows now what was best?

ISSUES

First: According to applicable statutes and cases, the Immigration and Naturalization Service of the Department of Justice is a department of the United States within the meaning of 18 USC § 1001.

Second: According to general precepts of statutory construction, 18 USC § 1001 is a general statute and 18 USC § 1015(a) is a special statute dealing with immigration matters. There is a difference of language particularly as to penalty. The question to be resolved is whether the appellant is properly charged?

Third: Assuming that defendant is properly charged, is a simple "no" or "none" or even one name answer to a question in a questionnaire so deceitful and fraudulent as to be a violation of the statutes.

Fourth: The Court prejudiced the jury against defendant by his constant attacks upon defense counsel.

LAW

FIRST: ACCORDING TO APPLICABLE STATUTES AND CASES, THE IMMIGRATION AND NATURALIZATION SERVICE OF THE DEPARTMENT OF JUSTICE IS A DEPARTMENT OF THE UNITED STATES WITHIN THE MEANING OF 18 U.S.C. §1001.

According to 5 USC § 101, 18 USC § 6 and *U.S. v. Germaine,* 1878, 99 US 508, 510-511, the Justice Department is a department of the United States within the meaning of 18 USC § 1001 so that a false or fraudulent statement made by an accused to an officer of the Justice Department is ordinarily actionable. *Haddad v. U.S.,* 9th Cir. 1965, 349 F 2d 511.

SECOND: ACCORDING TO GENERAL PRECEPTS OF STATUTORY CONSTRUCTION, 18 U.S.C. §1001 IS A GENERAL STATUTE AND 18 U.S.C. § 1015(a) IS A SPECIAL STATUTE DEALING WITH IMMIGRATION MATTERS. THERE IS A DIFFERENCE OF LANGUAGE PARTICULARLY AS TO PENALTY. THE QUESTION TO BE RESOLVED IS WHETHER THE APPELLANT IS PROPERLY CHARGED.

The provisions of 18 USC § 1015(a) relate to false or fraudulent statements, either oral or written, made by applicants or petitioners to the Service. 18 USC § 1001 applies to all federal instrumentalities.

There is a variance between the two sections as to penalty. § 1001 provides up to 5 years in prison or a fine up to *$10,000* or both. § 1015 is a 5 year *$5,000* statute. By its terms, it is thus more favorable to de-

fendant than § 1001, one of the criteria employed by courts in determining legislative intent. Given a choice between two possibly applicable statutory schemes, a specific statute must be charged rather than one of more general scope.

Illustrative of this principle are the following quotations from American Jurisprudence:

50 Am. Jur., Statutes, § 6, p. 19,

"A law is a general one where it relates to persons, entities, or things as a class, or operates equally or alike upon all of a class, . . .".

§ 7, pp. 21 and 22,

". . . (A) statute is regarded as a 'special law' if it does not have a uniform operation . . . (or) if it relates to particular persons . . . of a class, . . . either particularized by the express terms of the act . . . from the whole class to which the law might, but for such limitations, be applicable".

§ 367, p. 371,

". . . (W)here an act contains special provisions they must be read as exceptions to a general provision . . . in the same statute . . . (and) where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision".

Clifford F. MacEvoy Co. v. U.S., 322 US 102, 107.

THIRD: ASSUMING THAT DEFENDANT IS PROPERLY CHARGED, IS A SIMPLE "NO" OR "NONE" OR EVEN ONE NAME ANSWER TO A QUESTION IN A QUESTIONNAIRE SO DECEITFUL AND FRAUDULENT AS TO BE A VIOLATION OF THE STATUTE?

To be actionable either under 18 USC § 1001 or 18 USC § 1015, the declaration or statement must be material in that it would bear on the decision making process of a department or agency. *Brandow v. U.S.,* 9th Cir. 1959, 268 F 2d 559, 562 and 564, or the Immigration and Naturalization Service, *Dear Wing Jung v. U.S.,* 9th Cir. 1962, 312 F 2d 73, *U.S. v. Udani,* D. C. Cal. 1956, 141 F Supp. 30, and *U.S. v. Bridges,* D. C. Cal. 1949, 86 F Supp. 922.

Attention will now be directed to two lines of authority in the federal courts that deal with the simple negative response. One line holds that a denial or negative response is within § 1001. Examples are *U.S. v. Blake,* D. C. Mo. 1962, 206 F Supp. 706, *U.S. v. Glarraputo,* D. C. N. Y. 1956, 140 F Supp. 831, cf. *U.S. v. Adler,* 2nd Cir. 1967, 380 F 2d 917, 922. The other line holds that a negative response is not a statement or report within the ambit of § 1001. It is exemplified by *Paternostro v. U.S.,* 5th Cir. 1962, 311 F 2d 298, 305 and 309, *Friedman v. U.S.,* Mo. Cir. 1967, 374 F 2d 363, *U.S. v. Davey,* D. C. N. Y. 1957, 155 F Supp. 175, 176, *U.S. v. Stark,* D. C. Md. 1955, 131 F Supp. 190, 199, *U.S. v. Philippe,* D. C. S. D. N. Y. 1959, 173 F Supp. 582, and *U.S. v. Allen,* D. C. S. D. Cal. 1961, 193 F Supp. 954.

These divergent views pivot upon whether the governmental agency to whom the false report or statement was made is an investigational agency or

one that can act independently upon the supplied false information and whether "no" or "none" by ordinary language usage is a "statement or report" within the meaning of § 1001 or § 1015. Perhaps there was also some humanity in the liberal line represented by *Paternostro,* ante, and *Allen,* ante, in that the defendant is given the benefit of a strict and narrow statutory construction.

FOURTH: THE COURT PREJUDICED THE JURY AGAINST DEFENDANT BY HIS CONSTANT ATTACKS UPON DEFENSE COUNSEL.

The repeated "leans" by the Court, increasing in intensity as the trial progressed, when coupled with other specified error, cumulatively denied to defendant his right to a fair trial. *U.S. v. Guglielmini,* 2nd Cir. 1968, 384 F 2d 602.

Dated, San Francisco, California,
June 18, 1968.

Respectfully submitted,
GREGORY S. STOUT,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GREGORY S. STOUT,
Attorney for Appellant.

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Dated, San Francisco, California,
June 18, 1968.

Respectfully submitted,
GREGORY S. STOUT,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GREGORY S. STOUT,
Attorney for Appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMANUAL BLAZ MRKONJIC-RUZIC, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22108

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMANUAL BLAZ MRKONJIC-RUZIC, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22108 BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from a judgment of conviction in the United States District Court for the Northern District of California, Northern Division (Sacramento), for violation of Title 18 U.S.C. § 1001.

Jurisdiction in the District Court was predicated upon Title 18 U.S.C. § 3231. Jurisdiction in this Court is invoked under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Proceedings Below

On January 7, 1966, an indictment was filed in the United States District Court for the Northern District of

California, Northern Division, charging appellant, Emmanual Blaz Mrkonjic-Ruzic, with violation of Title 18 U.S.C. § 1001. Particularly it was charged that Ruzic concealed and covered up material facts and made false and fraudulent representations concerning prior use of names other than his true name in an application to file a petition for naturalization with the United States Immigration and Naturalization Service.

Ruzic was found guilty on March 15, 1967, after a trial by jury. On March 29, 1967, he was sentenced to imprisonment for a term of 5 years under the provisions of Title 18 U.S.C. § 4208(b) for the 90 day study under § 4208(c).

Notice of Appeal from this judgment of conviction was filed on March 29, 1967. On March 26, 1968 this Court ordered the appeal dismissed for lack of prosecution. That order was subsequently set aside on the motion of counsel for the appellant, and Appellant's Opening Brief was filed.

Statement of the Facts

Ruzic, a native of Yugoslavia, entered the United States on a student visa in August of 1954.1/ On June 17, 1965 he

1/ Reporter's Transcript, p. 459

applied for naturalization in Sacramento, California.2/ In connection with that application, he denied under oath, both orally and in writing, the prior use of any other names.3/

Although the evidence showed the prior use of various names by Ruzic, the prosecution was principally concerned with his use of the name Ignatius Bojanic. It was the failure to disclose the prior use of that name which effectively concealed and covered up the fact that Ruzic had repeatedly defrauded colleges, churches, and governmental agencies by fraudulently appropriating the name and academic identity of a Yugoslavian nun then residing in Canada. The nature and magnitude of his fraudulent practices was shown by the testimony of the numerous witnesses and massive documentary evidence introduced by the Government at trial.

This pattern of continued deception would have been relevant and material to an evaluation of Ruzic's good moral character, a duty imposed by statute upon the naturalization examiner, the officer to whom the false and concealing statements were made.4/

2/ Reporter's Transcript, p. 284
3/ Id., p. 291 and Government's Exhibit 41
4/ See Title 8 U.S.C. §§ 1427(a)(3), (e) and 1446(b)

ARGUMENT

I. IT WAS NOT ERROR TO CHARGE APPELLANT UNDER TITLE 18 U.S.C. § 1001 RATHER THAN TITLE 18 U.S.C. § 1015(a).

Ruzic argues that he should have been prosecuted under Title 18 U.S.C. § 1015(a),5/ which he contends is a special offense controlling over § 1001[6]/ under which he was charged. Such an argument could be considered only where

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5/ Title 18 U.S.C. § 1015(a) reads as follows:

> "(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens;
>
> * * *
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

6/ Title 18 U.S.C. § 1001 reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

both statutes relate to the same criminal act. Where the so-called general statute proscribes conduct which is not covered by the so-called special statute, the Government is not required to charge under the latter. Conerly v. United States, 350 F.2d 679 (9th Cir. 1965).

The two statutes involved here do not relate to the same criminal conduct. Section 1015(a) proscribes only the making of a false statement under oath. Section 1001, on the other hand, proscribes the willful concealment or covering up of a material fact, as well as the use of false statements (whether or not under oath). Thus, the gravamen of the offense committed by Ruzic could not have been charged under § 1015(a). The Government was entitled to and did rely heavily on Ruzic's concealment and covering up of material facts in obtaining the conviction in this case.

Moreover, since Ruzic did not assert this contention in the District Court, it may not be raised for the first time on appeal in the absence of a manifest miscarriage of justice or plain error seriously affecting the fairness of the proceedings below. See Billeci v. United States, 290 F.2d 628 (9th Cir. 1961); Herzog v. United States, 235 F.2d 664 (9th Cir. 1956); and cf. Conerly v. United States, supra.

The only prejudice which Ruzic claims to have resulted from his being charged under § 1001 instead of § 1015(a) is that §1001 carries a greater maximum fine -- both statutes carry the same maximum term of imprisonment. Where error is alleged in charging a defendant under a section carrying a greater penalty than that under which he should have been charged the proper remedy is to reduce the sentence to eliminate the excessive portion. See Robbins v. United States, 345 F.2d 930, 933 (9th Cir. 1965). Here, therefore, since Ruzic received no fine, any error in charging him under § 1001 was harmless.

II. APPELLANT'S NEGATIVE RESPONSES CONSTITUTED VIOLATIONS OF TITLE 18 U.S.C. § 1001.

Ruzic argues that his representations that he had never used another name constituted mere denials or negative responses and as such were not prohibited under § 1001. This contention not having been raised in the District Court is also presented for the first time on appeal.

In support of this contention, appellant relies upon the so-called "exculpatory no" cases. The reasoning of those cases has been rejected by this Court in Brandow v. United States, 268 F.2d 559, 564 (9th Cir. 1959), and by

the Second Circuit in United States v. Adler, 380 F.2d 917, 922 (2nd Cir. 1967), wherein the Court said:

> "In only the so-called 'exculpatory no' cases have the courts shown a reluctance to extend § 1001 'to cover the investigation of criminal conduct,' Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Philippe, 173 F.Supp. 582 (S.D. N.Y. 1959); United States v. Davey, 155 F.Supp. 175 (S.D. N.Y. 1957); United States v. Stark, 131 F.Supp. 190 (D. Md. 1955); United States v. Levin, 133 F.Supp. 88 (D. Colo. 1953). As stated in Stark, supra, 131 F.Supp. at 207:
>
> > The 5th Amendment provides that no person shall be compelled to be a witness against himself in criminal cases. While not strictly applicable here the construction of section 1001 here sought by the government seems inconsistent with this great bulwark of individual liberty.
>
> "However, even this exception to the application of § 1001 was rejected by the Ninth Circuit, Brandow v. United States, 268 F.2d 559 (9th Cir. 1959), and has not been adopted in this circuit. See, United States v. McCue [301 F.2d 452 (2nd Cir. 1962)]. See also, United States v. Van Valkenburg, 157 F.Supp. 599, 17 Alaska 450 (D. Alaska 1958)."

There is no sound reason to exclude false statements from the purview of § 1001 simply because they involve negative, rather than affirmative, responses to questions. In United States v. Blake, 206 F.Supp. 706, 708 (W.D. Mo. 1962) the Court held:

> "Negative responses to inquiries by government agencies have been held to violate Section 1001 in Pitts v. United States (C.A. 9) 263 F.2d 353, cert. den. 360 U.S. 935, 79 S.Ct. 1457, 3 L.Ed. 2d 1547, reh. den. 361 U.S. 857, 80 S.Ct. 47, 4 L.Ed. 2d 97; United States v. De Lorenzo (C.A. 2) 151 F.2d 122; United States v. Giarraputo (E.D. N.Y.) 140 F.Supp. 831. Furthermore, the words of the statute clearly cover negative answers in that the statute expressly applies to anyone who 'conceals or covers up * * * a material fact * * *.' For these reasons, the contention that a negative answer cannot be made the basis of a prosecution under Section 1001 cannot be sustained."

Moreover, the authorities upon which appellant relies involve false responses to questions propounded by agencies such as the Federal Bureau of Investigation during the course of an investigation. Under those circumstances, some courts have held that the matter was not "within the jurisdiction" of the investigative agency within the meaning of § 1001. See Friedman v. United States, 374 F.2d 363

(8th Cir. 1967); United States v. Davey, supra; and United States v. Stark, supra. In Friedman, the Court held that, "Jurisdiction means the right to say and the power to act." (374 F.2d at 367), and added that, "When the false statement is made to the agency with the power to allow the privilege or grant the award, jurisdiction of the agency is established so as to warrant a prosecution under § 1001." (374 F.2d at 369).

In the present case, the naturalization examiner was not acting merely as an investigator without jurisdiction to make a decision or recommendation. On the contrary, he was required under the provisions of Title 8 U.S.C. § 1446(b) to conduct a preliminary examination upon appellant's petition and to make recommendations thereon to the Court.

Thus, we submit that even those courts which follow the reasoning of the "exculpatory no" cases would not apply that exception to the present case. In Paternostro, supra, the Court emphasized that the appellant in that case had not deliberately initiated any positive or affirmative statement calculated to pervert the legitimate functions of Government (311 F.2d at 305). In the present case, Ruzic did just that. The Immigration and Naturalization Service did not approach

him seeking information; he approached the Service seeking the high privilege of becoming a citizen of the United States. His false representation was not made merely to exculpate himself from potential criminal prosecution; it was made for the calculated purpose of fraudulently inducing the agency to act favorably upon his application for citizenship. As the Court observed in United States v. Adler, supra:

> "In any event, the 'exculpatory no' cases are readily distinguishable from this case where appellant made an affirmative, voluntary statement deliberately intented to provoke agency action. See, Paternostro, supra; Philippe, supra; Stark, supra."

III. APPELLANT RECEIVED A FAIR TRIAL.

Appellant contends that the trial Court prejudiced the jury against him by constant attacks upon defense counsel. We submit that the Court's remarks to defense counsel were not unjustified and, as shown by appellant's Statement of the Facts, were for the most part brought about by the deliberate provocation of defense counsel at trial.

Furthermore, most of the exchanges to which counsel for appellant refers took place outside the presence of the

jury. Particularly, the Court excused the jury prior to the colloquy which counsel terms a holocaust (Appellant's Opening Brief, p. 11),7/ prior to the Court's admonition to defense counsel against trying his case out of turn,8/ and prior to the Court's reference to defense counsel's statement characterizing Ruzic as "lily white."9/ The remaining comments, made in the presence of the jury, were not only justified but, we submit, appropriate, if not necessary, in order for the District Judge to keep defense counsel in line and thereby assure an orderly and fair trial for both the defendant and the Government. Cf. Inland Freight Lines v. United States, 191 F.2d 313, 316 (10th Cir. 1951).

Moreover, the Court instructed the jury:

> "If the Court has at any time during the trial asked any questions, made any ruling, used any language or done anything which seemed to you to indicate the opinion of the Court as to any question of fact, you must not be influenced thereby, but must determine for yourselves all question of fact, without regard to any opinion you may suppose the Court may have or entertain. The question of the guilt or innocence of the defendant is for you alone, regardless of

7/ Reporter's Transcript, p. 436
8/ Id., pp. 369, 373
9/ Id., pp. 235, 238

what the Court or anybody else may think about it.

"To state the matter in another way, let me say that I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not established; what inferences should be drawn from the evidence; or any opinion concerning the guilt or innocence of the defendant. If any statement, expression or act of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."10/

We submit that appellant received a fair trial.

CONCLUSION

For the foregoing reasons, we urge that the judgment below be affirmed.

Respectfully submitted,

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By William B. Shubb
WILLIAM B. SHUBB
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10/ Reporter's Transcript, p. 864

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William B. Shubb

WILLIAM B. SHUBB
Assistant United States Attorney

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief for Appellee was this date mailed to Gregory S. Stout, 220 Montgomery Street, San Francisco, California 94104, Attorney for Appellant.

DATED: September 9, 1968

William B. Shubb

WILLIAM B. SHUBB

Subscribed and sworn to before me
this 9th day of September, 1968.

DEPUTY CLERK, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA